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LET THEM EAT CAKE OR LET HIM NOT BAKE? SUMMARY AND ANALYSIS OF *MASTERPIECE CAKESHOP V. COLORADO CIVIL RIGHTS COMMISSION*

Michael Beato[*]

INTRODUCTION

Unlike most cases brought before the United States Supreme Court, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[1] captured the nation's attention. In this case, free speech rights were pitted against an anti-discrimination law, and religious rights were pitted against the dignity of same-sex marriage. While these constitutional doctrines might seem nuanced and obscure to most, the central issue of the case is easy to grasp: Can a baker, on free speech and free exercise grounds, refuse to bake a wedding cake for a same-sex couple?[2] The Court, in a 7–2

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1. 138 S. Ct. 1719 (2018).

2. *Id.* at 1723.

decision,[3] ruled solely on the free exercise claim, which, at the time, came as a surprise to most.[4]

This Comment serves a few purposes: It explains the facts of the case and the Justices' arguments, summarizes the relevant constitutional doctrines, and provides some novel thoughts on the decision reached.

I. THE FACTS OF THE CASE

In 2012, Charlie Craig and David Mullins planned to marry in Massachusetts.[5] Even though their home state of Colorado did not recognize same-sex marriage, they intended to celebrate their marriage with family and friends there.[6] To procure a celebratory wedding cake, the couple visited Masterpiece Cakeshop, a Colorado bakery owned by Jack Phillips, a devout Christian.[7] Craig, Mullins, and Phillips's interaction at Masterpiece lasted mere moments.[8] The couple told Phillips that they intended to buy a wedding cake for "our wedding," and Phillips told the couple that he "does not 'create' wedding cakes for same-sex weddings."[9] Phillips based this decision on his religious beliefs.[10] Neither party discussed design or other aesthetic characteristics of the cake.[11] Phillips offered the couple "birthday cakes, shower cakes, . . . cookies[,] and brownies" but would not create a wedding cake.[12] The couple left the

3. *Id.* at 1722.

4. *Id.* at 1724. One commentator said that the Court "confounded all expectations." Michael W. McConnell, *Justices Confound Expectation in Colorado Wedding Cake Case*, SLS (June 4, 2018), https://law.stanford.edu/2018/06/04/justices-confound-expectation-in-colorado-wedding-cake-case/ [https://perma.cc/SFH4-8TC7].

For what it is worth, Jack Phillips, the owner of Masterpiece Cakeshop, is back in court with another discrimination-based lawsuit. Colleen Slevin, *Colorado Baker Back in Court over 2nd LGBT Bias Allegation*, AP (Dec. 19, 2018), https://www.apnews.com/1a242f6d02d54cc68963a18e9ee3ede5 [https://perma.cc/HBA7-LTPU].

5. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

6. *Id.* Three years later, the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), constitutionalized the right to same-sex marriage. *Id.* at 2604 ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

7. *Masterpiece Cakeshop*, 138 S. Ct. at 1724. In his concurring opinion, Justice Thomas provided a more detailed description of Phillips's artistic practices and religious beliefs. *Id.* at 1742–43 (Thomas, J., concurring).

8. *See* Brief for Respondents Charlie Craig & David Mullins at 4, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

9. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

10. *Id.* ("To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own deeply held beliefs.").

11. *See id.*

12. *Id.*

bakery, and the following day, Craig's mother telephoned the bakery.[13] When Craig's mother asked why Phillips would not bake the wedding cake for her son, Phillips again explained his religious objections.[14]

In September 2012, Craig and Mullins filed a discrimination claim with the Colorado Civil Rights Commission.[15] The couple alleged that Phillips violated the Colorado Anti-Discrimination Act, which prohibits places of public accommodation from discriminating based on sexual orientation.[16] Phillips argued that Colorado's enforcement of the anti-discrimination law violated his constitutional rights to free speech and free exercise of religion.[17]

The case snaked its way through the state administrative agency,[18] where each decision-making body ruled against Phillips.[19] Eventually, the case came before the full commission.[20] The commission concluded that Phillips discriminated against Craig and Mullins based on their sexual orientation and ordered Phillips to comply with remedial measures.[21]

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13. *Id.*

14. *Id.* Justice Gorsuch, in his concurring opinion, used the fact that Phillips denied the mother's request to bake the cake to argue that Phillips—regardless of the sexual orientation of the customer—would not bake a cake for a same-sex wedding. *Id.* at 1735 (Gorsuch, J., concurring). Therefore, according to the Justice, Phillips did not discriminate based on sexual orientation. *Id.* at 1735–36.

15. *Id.* at 1725 (majority opinion).

16. *See id.* Specifically, the act states the following:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

COLO. REV. STAT. § 24-34-601(2)(a) (2018).

17. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

18. The Court described how a case makes its way through the state agency. After a complaint is filed, the Colorado Civil Rights Division investigates the claim and determines whether the state anti-discrimination law was violated. *Id.* at 1725. If the division so decides, the case goes before the Colorado Civil Rights Commission, where the commission determines whether to "initiate a formal hearing before" an administrative law judge. *Id.* If the commission so decides, the administrative law judge hears the case and issues a ruling. *Id.* That ruling may then be appealed to the commission. *Id.*

19. *Id.* at 1726.

20. *Id.*

21. *Id.* ("The Commission ordered Phillips to 'cease and desist from discriminating against . . . same-sex couples . . . .' It also ordered additional remedial measures, including 'comprehensive staff training on the Public Accommodations section' of [the anti-discrimination law] 'and changes to any and all company policies[,]' . . . [and required] Phillips to prepare

Throughout the adjudication, many commissioners commented on Phillips's religious basis for denying service to Craig and Mullins. One commissioner noted that Phillips needed to "compromise" his religious beliefs to conduct business in the state.[22] Another commented that religious freedom "has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust—I mean, we—we can list hundreds of situations . . . . [I]t is one of the most despicable pieces of rhetoric . . . ."[23]

Phillips appealed to the Colorado Court of Appeals, which affirmed the commission's decision.[24] The court determined that Phillips's free speech rights were not violated because baking is not expressive conduct protected by the First Amendment and that the commission's order did not compel Phillips to convey a supportive message of same-sex marriage.[25] The court also determined that Phillips's free exercise rights were not violated because the anti-discrimination law is a law of general application that the commission applied neutrally.[26] The Colorado Supreme Court denied review, but the United States Supreme Court granted certiorari in 2017.[27]

Around the same time of Phillips's adjudication, the commission handled a somewhat similar case. William Jack, a devout Christian, sought to purchase a custom-made cake with anti-gay designs.[28] Three Colorado bakeries denied Jack's requests, and Jack filed a complaint with the Colorado Civil Rights Commission.[29] The commission determined that the bakeries properly denied Jack's requests since their denials were based not on Jack's religion but on the cake designs' anti-gay messages, which the commission deemed offensive.[30]

'quarterly compliance reports' . . . and . . . 'describ[e] the remedial actions taken.'" (first alteration in original) (citations omitted)).

22. *See id.* at 1729.

23. *Id.*

24. *Id.* at 1726–27.

25. *Id.* at 1727.

26. *Id.* Justice Kennedy noted that the court of appeals did not mention the commission's religion-related comments and that it instead, only in a footnote, compared the commission's handling of William Jack's and Phillips's cases. *Id.* at 1730.

27. *Id.* at 1727.

28. *Id.* at 1732 (Kagan, J., concurring). Justice Ginsburg, in her dissent, provided more information about Jack's cake designs. *Id.* at 1749 (Ginsburg, J., dissenting).

29. *Id.* at 1728–29 (majority opinion).

30. *Id.*

II. THE FREE EXERCISE DOCTRINE

The First Amendment prescribes that "Congress shall make no law . . . prohibiting the free exercise" of religion.[31] Even with this broad constitutional protection, under certain circumstances the government can compel or punish conduct that an individual's religion prohibits.[32] For example, the government can compel a food vendor to sell food to African Americans, despite the vendor's religious objections.[33] As established in *Employment Division v. Smith*,[34] the government can compel or punish conduct, despite religious objections, if the government neutrally enforces a generally applicable law.[35] For example, the government can enforce a generally applicable anti-drug-consumption law to prevent the ritual consumption of a psychedelic drug.[36]

Under the *Smith* framework, neutral administration and enactment of law is a key aspect of the analysis.[37] The government must treat each religious individual or group with respect and tolerance.[38] Even "subtle

31. U.S. CONST. amend. I; *see also* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

Academics dispute the original understanding of the Free Exercise Clause. Some academics believe that the clause exempts religious objectors from neutral laws of general applicability. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("The conclusions of this analysis are (1) that exemptions were seen as a constitutionally permissible means for protecting religious freedom, (2) that constitutionally compelled exemptions were within the contemplation of the framers and ratifiers as a possible interpretation of the free exercise clause, and (3) that exemptions were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God."). Others believe that such exemptions were not originally understood. *See, e.g.*, Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083, 1085 (2008) (concluding, after analyzing the drafting of the Second Amendment, that such exemptions were not originally understood).

32. *E.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402–03 n.5 (1968).

33. *Id.* at 400, 402 n.5.

34. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Holt v. Hobbs, 135 S. Ct. 853 (2015).

35. *Id.* at 886 n.3.

36. *See id.* at 890.

37. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."). *See also* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 396–97 (1990) ("From the State's point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which only involves a secular determination.").

38. *See id.* at 540; *see also id.* at 547 ("The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem

departures from neutrality" evidence a lack of respect for and tolerance of religion, which violates the First Amendment.[39] This determination is based on "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[40] Additionally, the government cannot engage in "religious gerrymander[ing]," where the government creates rules or schemes that target or affect only religious individuals or entities.[41]

To illustrate, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[42] the Hialeah City Council passed an ordinance that prohibited animal sacrifice, a known ritual of the Santeria religion.[43] During deliberations, city council members commented on the Santeria religion. One councilman questioned, "[I]f we could not practice this [religion] in our homeland [of Cuba], why bring it to this country?"[44] Another stated that members of the Santeria religion "are in violation of everything this country stands for."[45] Another stated that he was "totally against the sacrificing of animals" because although the "Bible says we are allowed to sacrifice an animal for consumption[;] . . . for any other purposes, I don't believe that the Bible allows that."[46]

The Court determined that the city council enacted this ordinance to specifically target members of the Santeria religion.[47] Using the *Smith* framework, the Court held that the ordinance was not a neutral law of general applicability.[48] Speaking to neutrality, the Court determined that the ordinance was passed to suppress religion.[49] The Court held:

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from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.").

39. *Id.* at 534 (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

40. *Id.* at 540. In other words, courts must look to "direct and circumstantial evidence." *Id.*

41. *See id.* at 535 (defining "religious gerrymander" as "an impermissible attempt to target petitioners and their religious practices" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring))); *see also* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 863–67 (2001) (analyzing the religious gerrymander in *Church of Lukumi Babalu Aye*).

42. 508 U.S. 520 (1993).

43. *Id.* at 527, 530.

44. *Id*. at 541 (alterations in original).

45. *Id.*

46. *Id.*

47. *Id.* at 545 ("We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief.").

48. *Id.* at 545–46.

49. *Id.*

> The pattern we have recited discloses *animosity to Santeria* adherents and their religious practices; the ordinances by their own terms *target this religious exercise*; the texts of the ordinances were *gerrymandered with care* to proscribe religious killings of animals but to exclude almost all secular killings; and the *ordinances suppress much more religious conduct than is necessary* in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.[50]

Thus, according to the Court, the city council violated the religious rights of the members of the Santeria religion.[51]

III. THE *MASTERPIECE CAKESHOP* OPINIONS

In a 7–2 decision, the United States Supreme Court, led by Justice Anthony Kennedy, ruled that the Colorado Civil Rights Commission violated Phillips's free exercise rights.[52] Justice Kagan, joined by Justice Breyer, wrote a concurring opinion that stressed the narrowness of the majority's opinion, and further argued that the commission could rightfully treat Jack's and Phillips's cases differently, and disagreed with Justice Gorsuch's concurrence.[53] Justice Gorsuch, joined by Justice Alito, concurred but elaborated on Phillips's free exercise claims in light of Justice Kagan's concurrence and Justice Ginsburg's dissent.[54] Justice Thomas, joined by Justice Gorsuch, concurred but wrote separately to rebut the Colorado Court of Appeals's free speech arguments.[55] Justice Ginsburg, joined by Justice Sotomayor, dissented and argued that the commission properly enforced the state anti-discrimination law.[56]

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50. *Id.* at 542 (emphasis added).

51. *Id.* at 547. The Court also analyzed the general applicability of the ordinance. *Id.* at 542–46.

52. Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).

53. *Id.* at 1732–34 (Kagan, J., concurring).

54. *Id.* at 1734–40 (Gorsuch, J., concurring).

55. *Id.* at 1740–48 (Thomas, J., concurring). Here is Justice Thomas's argument: For conduct to be expressive, thus warranting First Amendment free speech protections, (1) the actor must subjectively intend to convey a message through conduct and (2) the audience must objectively understand the communicative nature of the conduct. *Id.* at 1741. Justice Thomas argued that Phillips, by baking wedding cakes, subjectively believed that a wedding cake "communicates that 'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'" *Id.* at 1743. The audience understands that "[w]edding cakes do, in fact, communicate this message." *Id.* (analyzing the history of wedding cakes). Therefore, Justice Thomas would have ruled differently than the court of appeals.

56. *Id.* at 1748–52 (Ginsburg, J., dissenting).

IV. THE MAJORITY OPINION

Surprisingly, the Court decided the case on free exercise, not free speech, grounds.[57] Using the Free Exercise Clause's doctrinal framework, Justice Kennedy analyzed whether the Colorado Civil Rights Commission neutrally enforced a generally applicable law.[58] He determined that it did not.[59] In reaching this conclusion, Justice Kennedy focused on the commissioners' statements regarding religion that were made during Phillips's adjudication as well as the commission's disparate treatment of Jack's and Phillips's cases.[60]

Justice Kennedy described the commission's statements as "clear[ly] and impermissibl[y] hostil[e] toward" Phillips's religious beliefs.[61] For example, one commissioner stated that Phillips should compromise his religious beliefs to conduct business in the state.[62] Another commissioner attributed atrocities such as slavery and the Holocaust to religion, calling religion "despicable" rhetoric when it is used to justify discrimination.[63] Though Justice Kennedy ultimately determined that the former statement was open to different interpretations,[64] he described the latter statement as clear evidence of the commission's nonneutrality and hostility toward Phillips's religious beliefs.[65]

Justice Kennedy also analyzed the commission's treatment of William Jack, the Christian consumer who sought cakes with anti-gay messages.[66] The commission deemed Jack's cake designs offensive but praised the bakeries' willingness to bake religiously themed cakes without the anti-gay messages.[67] The commission determined that the bakeries properly

57. Justice Kennedy briefly touched on the free speech issues. He sympathized with the "artistic" Phillips's free speech beliefs, finding "it difficult to find a line where the customers' rights to goods and services became a demand for [Phillips] to exercise the right of his own personal expression for [Craig and Mullins's] message, a message he could not express in a way consistent with his religious beliefs." *Id.* at 1728 (majority opinion). But he noted that this issue "must await further elaboration in the courts." *Id.* at 1732.

58. *Id.* at 1731–32.

59. *Id.* at 1732.

60. *Id.* at 1729–31.

61. *Id.* at 1729.

62. *See id.*

63. *Id.*

64. "On the one hand," the statements could mean that businesses cannot discriminate based on sexual orientation "regardless of the proprietor's personal views." *Id.* "On the other hand," the statements could be dismissive comments about Phillips's religious beliefs. *Id.* "[T]he latter seems more likely." *Id.*

65. *Id.* ("This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law protects against discrimination on the basis of religion as well as orientation.").

66. *Id.* at 1730–31.

67. *Id.*

denied Jack's requests because their "conscience-based objections [were] legitimate."[68] With Phillips, Justice Kennedy noted that the commission seemingly approved of Craig and Mullins's wedding cake message but did not consider Phillips's willingness to bake other cakes, cookies, and brownies for the couple as it did in the case of Jack.[69] The commission determined that Phillips improperly denied Craig and Mullins's request because his conscience-based concerns were illegitimate.[70] Justice Kennedy concluded that, in doing so, the commission protected beliefs that it agreed with and impermissibly punished beliefs that it disagreed with.[71]

Because the commission expressed anti-religious sentiments during Phillips's case, and because the commission unequally applied the anti-discrimination law between Jack's and Phillips's cases, the majority held that the commission did not act in a neutral manner, which violated Phillips's free exercise rights.[72]

V. THE KAGAN CONCURRENCE

Justice Kagan, joined by Justice Breyer, concurred with the majority opinion.[73] Justice Kagan agreed that the commission did not act neutrally during Phillips's adjudication,[74] but asserted that Jack's and Phillips's cases were distinguishable.[75] Justice Kagan argued that the bakeries in Jack's case acted properly because they "did not single out Jack because of his religion."[76] The bakeries denied Jack's cake requests because they disagreed with the cake designs' anti-gay message—a message the bakeries would not have conveyed, regardless of customer.[77] Justice Kagan contended that Phillips, in contrast, singled out Craig and Mullins because of their sexual orientation.[78] While Phillips may have disagreed with same-sex marriage and the message that baking a wedding cake for a same-sex marriage could have conveyed, he would have baked the cake had the couple been opposite-sex.[79] Therefore, Phillips denied the couple

68. *Id.* at 1730.

69. *Id.*

70. *See id.*

71. *Id.* at 1731 ("A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness.").

72. *Id.* at 1732.

73. *Id.* (Kagan, J., concurring).

74. *Id.*

75. *Id.* at 1732–33 (describing the differences as "obvious").

76. *Id.* at 1733.

77. *Id.*

78. *Id.*

79. *Id.* Justice Gorsuch disagreed. *See id.* at 1736 (Gorsuch, J., concurring) ("In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers."). Justice Kagan

his service because of their sexual orientation and not the message that the wedding cake would have conveyed.[80] In Justice Kagan's opinion, this constituted unlawful discrimination under the state's anti-discrimination law.[81]

VI. THE GORSUCH CONCURRENCE

Justice Gorsuch, joined by Justice Alito, agreed with the majority's central arguments: The commission acted biasedly against Phillips's religion, and the commission treated Jack's and Phillips's cases disparately, all amounting to a violation of Phillips's free exercise rights.[82] The concurrence purported to take aim at Justice Kagan's concurrence and Justice Ginsburg's dissent.[83]

Generally, the more liberal Justices agreed that Jack's and Phillips's cases were distinguishable. Justice Kagan admitted that the commission could have, but failed to, articulate a proper reason for this different treatment,[84] while Justice Ginsburg wholly denied that the commission acted impermissibly at all.[85]

Justice Gorsuch highlighted that, in Jack's and Phillips's cases, the decisions were based on the "kind of cake, not the kind of customer."[86] In Jack's case, it was a cake with anti-gay messages.[87] For Phillips, it was a cake that endorsed same-sex marriage.[88] In Jack's case, the bakeries would have not have baked a cake with the anti-gay messages, regardless of the protected classification of the prospective customer.[89] For Phillips, he would not have baked a cake for a same-sex wedding, regardless of the protected classification of the prospective customers.[90] While the bakeries in the two cases knew that they were denying service to customers with a protected classification, the bakeries did not intentionally deny service because of the customers' protected

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reinforced her arguments in a footnote that was directed to Justice Gorsuch. *Id.* at 1733 n.* (Kagan, J., concurring).

80. *Id.* at 1733–34.

81. *Id.*

82. *Id.* at 1734 (Gorsuch, J., concurring)

83. *Id.*

84. *Id.* at 1733 (Kagan, J., concurring).

85. *Id.* at 1751 (Ginsburg, J., dissenting) ("I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips'[s] refusal to sell a wedding cake to Craig and Mullins.").

86. *Id.* at 1736 (Gorsuch, J., concurring).

87. *Id.* at 1735.

88. *Id.*

89. *Id.*

90. *Id.*

classifications.[91] The distinction between knowingly denying service and intentionally denying service was a material aspect of Justice Gorsuch's argument.[92]

Justice Gorsuch then commented on the commission's disparate treatment of Jack and Phillips, particularly in applying different legal standards to the two cases.[93] In Jack's case, the commission noted the difference between intentionally and knowingly denying service to a customer.[94] Because the bakeries knowingly denied service to Jack but did not intentionally do so because of his protected classification, the commission held that the bakeries acted permissibly.[95] But in Phillips's case, the commission held that denying service to a customer with a protected classification created a presumption of intentional discrimination.[96] Though Phillips knowingly denied service to Craig and Mullins but did not intentionally do so because of their classification, Phillips presumably discriminated based on a protected classification.[97] Justice Gorsuch noted that the commission was trying to "have it both ways."[98] "Either actual proof of intent to discriminate . . . is required . . . or it is sufficient to 'presume' such intent" from knowingly denying service to someone in a protected classification.[99] Such "slid[ing] up and down the *mens rea* scale," Justice Gorsuch concluded, would not do.[100]

VII. THE GINSBURG DISSENT

Justice Ginsburg, joined by Justice Sotomayor, argued that Jack's and Phillips's cases were distinguishable and the comments made by the commission did not violate Phillips's free exercise rights.[101] Justice Ginsburg parroted the arguments made in Justice Kagan's concurrence: The three bakeries in Jack's case properly denied his anti-gay cake requests because the bakeries disagreed with his message—a message they would not convey, regardless of the protected classification of the prospective customer—while Phillips improperly denied Craig and Mullins's request because of their sexual orientation.[102]

Justice Ginsburg noted that Phillips's offer to sell other baked goods

91. *Id.* at 1735–36.
92. *Id.*
93. *Id.* at 1736.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1737.
99. *Id.*
100. *Id.*
101. *Id.* at 1748–49 (Ginsburg, J., dissenting).
102. *Id.* at 1750.

to Craig and Mullins was "irrelevant" because Phillips makes wedding cakes for opposite-sex couples but not same-sex couples.[103] The three bakeries' offering to sell Jack a cake with religious symbolism other than an anti-gay-marriage message was relevant because the bakeries offer religious cakes to Christian and non-Christian consumers alike.[104]

Justice Ginsburg also understated the commissioners' anti-religious statements. The Justice saw "no reason why the comments of one or two Commissioners should be taken to overcome Phillips'[s] refusal to sell a wedding cake to Craig and Mullins."[105] She noted that Phillips's case snaked through the Colorado Civil Rights Commission and was also evaluated by the Colorado Court of Appeals after the commission's decision.[106] Each decision-making body ruled against Phillips.[107] She faulted the majority for not identifying where prejudice manifested itself in the decision-making process.[108] She also differentiated between the case at issue and the Court's free exercise precedent.[109] Taken in total, Justice Ginsburg would have ruled in favor of Craig and Mullins.[110]

VIII. ANALYSIS

To begin broadly, the Supreme Court, somewhat startlingly, ruled solely on the free exercise arguments, as opposed to the free speech arguments.[111] Perhaps there is some virtue to this decision. For one, the free speech arguments are definitely the less clear-cut of the two arguments,[112] and the commission clearly violated Phillips's free exercise rights by acting in a nonneutral manner. Granted, the case was teed up as a free speech case—even the Solicitor General's brief only addressed the free speech arguments.[113] The free exercise ruling leaves one a bit wanting. But still, this case was—and is—controversial. Thus, by solely

103. *Id.*
104. *Id.*
105. *Id.* at 1751.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1751–52.
110. *Id.* at 1752.
111. *Id.* at 1732 (majority opinion).
112. Even Justice Kennedy admitted this. He sympathized with the "artistic" Phillips's free speech beliefs, finding it "difficult to find a line where the customers' rights to goods and services became a demand for [Phillips] to exercise the right of his own personal expression for [Craig and Mullins's] message, a message he could not express in a way consistent with his religious beliefs." *Id.* at 1728.
113. Brief for the United States as Amicus Curiae Supporting Petitioners at III, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing, solely, that the "First Amendment's Free Speech Clause bars the application of Colorado's public accommodations law to petitioners in this case").

addressing the less controversial constitutional issue, the Court avoided a sharper public reaction and afforded more time for the free speech issues to percolate.

Turning to the free exercise arguments, the Court determined that the Colorado Civil Rights Commission did not enforce the state's anti-discrimination law neutrally, and this lack of neutrality was evidenced by the commission's statements on religion and the commission's disparate treatment of the Jack and Phillips cases.[114]

This analysis stayed true to the Court's precedent. The Court stayed within its *Smith* free exercise framework and provided another example where the government applied a law nonneutrally. Specifically, the Court looked to "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[115] In this case, the Court looked to the "specific series of events" of the commission's adjudication of Jack's and Phillips's cases.[116] It looked to the "contemporaneous statements made by members" of the commission.[117] The Court then determined that the commission engaged in a religious gerrymander, where the government applied different rules and standards to religious and non-religious actors.[118] Taken in total, the Court determined that the commission did not act neutrally and thus violated Phillips's free exercise rights.[119]

While seven of the nine Justices agreed with this result,[120] Justices Ginsburg and Sotomayor did not. The dissent instead argued that the commissioners' statements regarding Phillips's religion were irrelevant, that anti-religious prejudice could not be found in the decision-making process, and that the majority did not adhere to its free exercise precedent.[121] In doing so, the dissent risks complicating the Free Exercise Clause analysis by adding exceptions and qualifications to the doctrine. Ultimately, the dissent's arguments missed the mark, and each argument is next discussed in turn.

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114. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

115. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 532, 540 (1993). In other words, courts must look to "direct and circumstantial evidence." *Id.*

116. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30, 1731.

117. *Id.*

118. *See id.* at 1732; *id.* at 1739 (Gorsuch, J., concurring).

119. *Id.* at 1731 (majority opinion) ("For the reasons just described, the Commission's treatment of Phillips'[s] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.").

120. *Id.* at 1722. Granted, Justices Breyer and Kagan believed that the Jack and Phillips cases were distinguishable from one another. *Id.* at 1732–33 (Kagan, J., concurring).

121. *Id.* at 1751–52 (Ginsburg, J., dissenting).

First, the dissent simply tossed the commission's comments on religion aside. The dissent saw "no reason why the comments of one or two Commissioners should be taken to overcome Phillips'[s] refusal to sell a wedding cake to Craig and Mullins."[122] However, when analyzing free exercise claims, courts must look to "contemporaneous statements made by members of the decisionmaking body."[123] And the statements made by some commissioners were plainly biased against Phillips's religion. One commissioner commented that religious beliefs should be compromised to conduct business in Colorado.[124] Another attributed mass atrocities to religion.[125] Like the comments made by the Hialeah City Council in *Church of Lukumi Babalu Aye*,[126] these statements evidenced a bias against religion. These statements showed intolerance for Phillips's religion, and tolerance, according to the Court, is crucial to an individual's free exercise rights.[127]

True, only a few commissioners made these statements. But as the dissent noted,[128] even if "one or two" commissioners made these statements, as opposed to four or five, these statements, at best, evidence that "one or two" commissioners did not neutrally enforce the anti-discrimination law. At worst, they evidence that anti-religious sentiment festered in the commission's adjudication. Either way, a governmental body and governmental actors showed intolerance for an individual's religion.[129] The Court majority suggests that every governmental actor, at every step of the adjudicatory process, must show tolerance and respect for religion. This ensures governmental respect and toleration of religious values and, in turn, protects religious liberty.

The dissent focused too heavily on the actions of the lower levels of the commission and the appellate review of the court of appeals. True, the record does not evidence that these decision-making bodies showed

122. *Id.* at 1750.

123. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 532, 540 (1993).

124. *See Masterpiece Cakeshop*, 138 S. Ct. at 1729.

125. *Id.*

126. 508 U.S. at 541.

127. *Id.* at 532 ("Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" (quoting Bowen v. Roy, 476 U.S. 693, 703 (1986))).

128. *See Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

129. *See generally* Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) ("[A] 'fair trial in a fair tribunal is a basic requirement of due process.' . . . Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (citation omitted) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))).

bias or animosity toward Phillips.[130] But the commission did. The commission was intolerant of Phillips's beliefs, regardless of the court of appeals's or the lower levels of the commission's actions. The commission itself caused harm to Phillips's religious rights, and as such, the inquiry should center on the commission. Appellate courts and lower adjudicatory bodies cannot and should not wash away constitutional violations of governmental bodies.

This intolerance and nonneutrality are evidenced not only by the commission's contemporaneous statements but also by the specific series of events in its adjudication of Jack's and Phillips's cases. Justice Gorsuch's concurrence got this argument right: The commission departed from neutrality via a religious gerrymander.[131] The commission differentiated between knowing and intentional discrimination in Jack's case but applied a presumption of discrimination in Phillips's case.[132] The commission determined that the bakeries in Jack's case acted properly in denying his requests while Phillips acted impermissibly.[133] This disparate treatment—evidenced by the commission's different set of rules for each case—coupled with the commission's religious statements shows nonneutral enforcement of the anti-discrimination law.

The dissent also noted that the majority's opinion is "far removed" from the Court's opinion in *Church of Lukumi Babalu Aye*.[134] The dissent argued that in *Church of Lukumi Babalu Aye*, one single decision-making body—the Hialeah City Council—acted and violated a religious group's rights.[135] In *Masterpiece Cakeshop*, Phillips's case was heard by and adjudicated in numerous decision-making bodies.[136] The dissent argued that prejudice was clearly found in the single decision-making body in the former case and that prejudice could not be found in the numerous decision-making bodies in the latter case.[137]

However, the dissent's interpretation of *Church of Lukumi Babalu Aye* is far removed from that case's holding. In that case, the Court held that "subtle departures from neutrality" violate the First Amendment since the Constitution "commits the government itself to religious tolerance, and

130. *See Masterpiece Cakeshop*, 138 S. Ct. at 1725–26.

131. *Id.* at 1739 (Gorsuch, J., concurring).

132. *Id.* at 1735–36.

133. *Id.* at 1736.

134. *Id.* at 1751 (Ginsburg, J., dissenting).

135. *Id.* at 1751–52 ("What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips'[s] case is thus far removed from the only precedent upon which the Court relies, where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council." (citation omitted)).

136. *Id.* at 1751.

137. *Id.* at 1751–52.

upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures."[138] The Hialeah City Council's actions and statements evidenced a lack of neutrality. In this case, the commission, via its comments about religion and its treatment of Jack's and Phillips's cases, evidenced intolerance for Phillips's religious beliefs, thus violating Phillips's constitutional rights.

True, the governmental entity in *Church of Lukumi Babalu Aye* was a city council, and the governmental entity in *Masterpiece Cakeshop* was an adjudicatory state administrative agency. But the nonneutrality and biased decision-making of an adjudicatory governmental entity should cause more concern than a legislative entity. After all, in adjudications, liberty interests are often at stake,[139] and due process is premised on impartial decision-making.[140]

Taken in total, the majority and Justice Gorsuch's concurrence persuasively analyzed the free exercise arguments in the case and adhered to the Court's precedent. The same, however, cannot be said of the dissent.

CONCLUSION

The Supreme Court's decision in *Masterpiece Cakeshop* was an unexpected one. The case was widely billed as a free speech case but was resolved on free exercise grounds. Many thought that the case would come down on ideological lines, but a 7–2 majority ruled the day. Despite the seven-person majority, each Justice would have resolved the case slightly differently. Still, the *Masterpiece Cakeshop* case does provide some answers. The Court's decision affirmed the Court's *Smith* free exercise framework, provided another example of nonneutral governmental action, and reinforced an important tenet of the Free Exercise Clause—the government must respect and tolerate religion.

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138. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534, 547 (1993) (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

139. *See generally* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572 (1972) ("[T]he court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.").

140. *See* Withrow v. Larkin, 421 U.S. 35, 46–47 (1975) ("[A] 'fair trial in a fair tribunal is a basic requirement of due process.' . . . Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (citation omitted) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))). *But see Church of Lukumi Babalu Aye*, 508 U.S. at 557–59 (Scalia, J., concurring) (questioning the extent to which comments made during the legislative decision-making process should be considered in this analysis).